No. 13

In the Supreme Court of the United States

October Term, 1936

Becker Steel Company of America, petitioner

v.

Homer S. Cummings, Attorney General of the United States in the Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit

Brief for the Respondents

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No. 13

BECKER STEEL COMPANY OF AMERICA, PETITIONER

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE United States, in his Official Capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 13–15) is reported in 10 F. Supp. 343. The *per curiam* opinion of the Circuit Court of Appeals (R. 18), adopting the opinion of the District Court, is reported in 75 F. (2d) 1005.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 11, 1935 (R. 19). The petition

for a writ of certiorari was filed March 27, 1935 (R. 20), and was granted April 29, 1935 (R. 19). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Alien Property Custodian, acting under the Trading with the Enemy Act, seized certain shares of stock owned by the petitioner and, no claim to these shares having then been filed by the petitioner, sold the shares and paid the expenses of the sale from the proceeds. Petitioner having subsequently proved its non-enemy character, the net proceeds of the sale were paid over to it. Does the District Court have jurisdiction, under the Trading with the Enemy Act or otherwise, to entertain this suit by the petitioner to recover the amount of the expenses so deducted from the proceeds of the sale?

STATUTE INVOLVED

The applicable portions of the Trading with the Enemy Act are set forth in the Appendix, *infra*, pp. 35–37.

STATEMENT

This suit was instituted in the District Court for the Southern District of New York by the Becker Steel Company of America, a corporation organized under the laws of West Virginia, to recover a sum of money deducted by the Alien Property Custodian from the proceeds of the sale of stock owned

by the petitioner and seized under the Trading with the Enemy Act. The amount deducted was used to defray the expenses incurred in the sale of the stock. The suit was brought under Section 9 (a) of the Act. The defendants are Homer S. Cummings, Attorney General of the United States, in his official capacity as Alien Property Custodian, and William A. Julian, as Treasurer of the United States. The defendants moved to dismiss for want of jurisdiction (R. 12), and their motion was granted (R. 13). On appeal to the Circuit Court of Appeals for the Second Circuit, the decree was affirmed (R. 19). This Court granted certiorari (R. 19).

The material facts shown by the complaint (R. 2–12) may be summarized substantially as follows:

(1) Pursuant to the provisions of the Trading with the Enemy Act, A. Mitchell Palmer, the then Alien Property Custodian, in July, 1918, required the petitioner to transfer to him 5,000 shares of stock in the petitioner corporation on the ground that they were owned by enemy aliens (R. 3–4).

(2) Notwithstanding the fact that 5,000 shares of petitioner's stock had been thus transferred to the Custodian, petitioner instituted suit (in the United States District Court for the Southern District of West Virginia) for the recovery of only 2,500 shares of that stock. Thereafter, pursuant to decree of the Court in that suit, 2,500 shares of stock were duly returned to the petitioner (R. 4).

(3) More than seven months after the seizure the Custodian sold the other 2,500 shares of stock to which no claim had been filed by petitioner, for the sum of $20,000.00, which was turned over to the Treasurer of the United States (R. 4).

(4) From that amount the Custodian and the Treasurer paid out sums totalling $3,887.84 to defray the expenses directly incurred in conducting the sale of the stock (R. 4, 5). There is no allegation that the expenses *per se* were in any way unreasonable or improperly incurred.

(5) More than three and a half years later, in October 1922, the petitioner for the first time filed with the then Alien Property Custodian, under Section 9 (a) of the Trading with the Enemy Act, a claim for the return of the $20,000.00 received from the sale of the stock (R. 5).

(6) Thereafter the petitioner brought suit in the District Court for the Southern District of New York, under Section 9 (a) of the Act, for the recovery of the $20,000.00 thus claimed (R. 5–6), and a judgment was entered therein in favor of the petitioner for the sum of $20,000.00 (R. 6).

(7) On applying for payment of this judgment, the petitioner was informed by the Custodian that the net proceeds of the sale of the 2,500 shares of stock amounted to only $16,112.16, as sums aggregating $3,887.84 had been expended in connection with the sale (R. 7). The Custodian, therefore, would not deliver the sum of $16,112.16 to the peti-

tioner until petitioner had signed a warrant of satisfaction of the judgment in full.[1] Such a warrant was accordingly executed by the petitioner on October 10, 1925, and it received the sum of $16,112.16 (R. 8).

(8) Thereafter, in the year 1927, the Custodian, upon a decision of this Court that interest must be paid on money belonging to American citizens and held by the Custodian under the Trading with the Enemy Act, voluntarily paid the petitioner interest upon the principal sum of $16,112.16 (R. 8).

(9) Although petitioner had previously executed a warrant of satisfaction of the judgment in full and had accepted $16,112.16 in payment thereof, and had later accepted payment of interest upon such sum, petitioner nevertheless brought suit in the year 1932 in the District Court for the Southern District of New York to recover the sum of $3,887.84, alleging that such sum had been paid out unlawfully from the principal of the fund received from the sale of petitioner's stock (R. 9). This suit was dismissed for misjoinder of parties (R. 10).

The present suit was instituted in July 1934, against the present defendants for the recovery of $3,887.84 with interest (R. 1–12). Defendants' motion to dismiss on the ground that the Court had no jurisdiction of them or of the subject matter of the

[1] This was in conformity with Section 7 (c) of the Act. For a discussion of the effect of that section, see pp. 14–16, *infra*.

action was granted (R. 13). The District Court held that an allegation that the Custodian or the Treasurer actually holds the money sought to be recovered at the time suit is instituted is a jurisdictional requisite of a suit brought, as this one was, under Section 9 (a) of the Trading with the Enemy Act. The petition contained no such allegation but instead expressly alleged that the money in question had been paid out long before (R. 4, 5). In the opinion, the District Court said (R. 15):

> It seems to me clear that Section 9a, properly interpreted, was intended to give the person whose property had been wrongfully seized and sold, a remedy against the Government only for such property or money as at the time of the commencement of the suit is actually in the possession of the Alien Property Custodian or the Treasurer of the United States, and, as decided in *Henkels* v. *Sutherland*, 271 U. S. 298 (1925), any income therefrom actually received by the Government.

The Circuit Court of Appeals affirmed upon the opinion of the District Court (R. 18).

SUMMARY OF ARGUMENT

I

This suit was instituted under Section 9 (a) of the Trading with the Enemy Act, which confers on the District Courts of the United States jurisdiction to entertain suits brought by citizens and non-

enemy aliens for the recovery of their property seized by the Alien Property Custodian as enemy-owned. The Trading with the Enemy Act provides that before seized property has been disposed of by the Alien Property Custodian a claimant may recover the property in full (Section 9 (a)), but that after such disposition the claimant may recover only the *net* proceeds (Section 7 (c)). This Court in *Henkels* v. *Sutherland*, 271 U. S. 298, 300, stated the relation of Sections 9 (a) and 7 (c) as follows:

> Section 9 (a) authorizes a suit in equity by any person not an enemy, etc., to determine a claim to any interest, right, or title in the property seized. If, in the meantime the seized property has been sold, the same remedy, by §7 (c), as amended, c. 201, 40 Stat. 1020, became available "against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

Section 9 (a) of the Act contemplates in the first instance a proceeding *in rem* for the recovery in specie of seized property still actually held by the Custodian or by the Treasurer at the time action is begun. Obviously the petitioner in this case cannot recover in such an action *in rem* because the bill of complaint shows on its face that at the time suit was instituted neither of the defendants held any of the property originally seized.

Insofar as Section 9 (a) authorizes, in addition to such a proceeding *in rem*, a suit for the recovery of the proceeds of property seized and subsequently disposed of by the Alien Property Custodian, it must be read in connection with Section 7 (c). Section 7 (c) expressly provides that when the Custodian, pursuant to the power of sale granted to him by Section 12, has sold seized property before claim to such property has been asserted, the citizen or non-enemy alien whose property was seized may recover only the *net* proceeds of the sale. Net proceeds in its proper and usual signification refers to that sum which is left after deducting, *inter alia*, the ordinary expenses of sale. *St. John* v. *Erie Ry. Co.*, 22 Wall. 136.

The limitation of recovery to net proceeds thus established by Section 7 (c) accords with the express language of Section 9 (a) which limits recovery in all instances to property *held* by the Custodian or by the Treasurer. After the original property has been sold and the expenses of sale paid, what is thereafter *held* by the Custodian or the Treasurer obviously is no more than the *net* proceeds. In this case the petitioner is precluded by Section 7 (c) from recovery because it has already received from the Custodian the net proceeds of the sale of its property, together with interest thereon.

Sections 9 (a) and 7 (c) must furthermore be construed in the light of Section 12 of the Act which

constitutes the Custodian a trustee of property, other than money, seized under the Act, and authorizes him to sell such property. Property seized is rightfully taken, even though it should subsequently develop that it was in fact the property of a citizen or a non-enemy alien (*Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stochr* v. *Wallace*, 255 U. S. 239), and the powers of the Custodian in holding and selling such property are those of a trustee. The sale of the petitioner's property was lawful because before the sale no claim to the property had been filed by the petitioner so as to require the property thereafter (under Section 9 (a)) to be held intact. A trustee is entitled to defray expenses properly incurred in the administration of the trust estate out of the trust property even in the absence of express authorization. *United States* v. *Swope*, 16 F. (2d) 215, 217 (C. C. A. 8th). The petitioner alleges that the sale of its stock by the custodian was illegal, but it does not allege that the expenses incurred in the sale were *per se* in any way unreasonable or improperly incurred. Therefore, the petitioner is not entitled to recover the sums properly expended by the Custodian in the sale of the stock of the petitioner. Cf. *Kelly* v. *Nichols*, 18 R. I. 62; *Collumb* v. *Read*, 24 N. Y. 505, 515; *Beck* v. *Kinealy*, 89 Mo. App. 418, 424.

Because this suit is against the United States, it can be brought only as authorized by specific statutory provision. It cannot be brought under

the Tucker Act[2] upon any theory of implied contract because the Trading with the Enemy Act, a later statute, expressly declares in Section 7 (c) that the remedies provided by that Act shall be exclusive for all claims arising out of seizures under the Act. Accordingly this suit can only be brought in conformity with the provisions of Sections 9 (a) and 7 (c) of the Trading with the Enemy Act. *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591; *Von Bruning* v. *Sutherland*, 29 F. (2d) 631 (App. D. C.).

II

The petitioner had ample opportunity to recover the stock by filing a claim under Section 9 (a). The bill of complaint shows that at the time the stock in question was seized, other similar stock belonging to the petitioner was also seized, and that the latter stock was in due course claimed and recovered *in specie* by the petitioner. Yet with respect to the stock involved in this suit, the petitioner chose to wait for four years after the seizure to file a claim, and it must therefore be content with the remedies provided by the statute for those who fail to bring a timely proceeding for specific recovery and delay

[2] The Tucker Act, c. 359, 24 Stat. 505, as amended (28 U. S. C. A., Sec. 41 (20)), vests in the District Courts of the United States original jurisdiction over suits brought on contracts, express or implied, with the Government of the United States. Suits instituted under the Act must be brought within six years after the accrual of the right for which claim is made.

until after the Custodian has exercised his lawful power of sale. This Court has held that the remedies afforded by the Act provide full and adequate protection for the citizen or non-enemy alien whose property has been mistakenly seized under the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. The petitioner, having failed to avail itself of its opportunity to recover the stock *in specie*, and having successfully exercised its right to recover the net proceeds under Section 9 (a) as qualified by Section 7 (c), cannot now contend that it has been deprived of its property unconscionably or without due process of law.

III

While this Court has not previously been called upon to pass upon the exact question presented by this case, its decisions fully support the construction placed upon Sections 9 (a) and 7 (c) of the Trading with the Enemy Act by the respondents herein and by both courts below. In *Henkels* v. *Sutherland*, 271 U. S. 298, 302, it was explicitly recognized that after the sale of property seized under the Act, the claimant was entitled, under Section 7 (c), only to that portion of the proceeds of the sale which remained after "proper charges and expenses" had been deducted. In *Escher* v. *Woods*, 281 U. S. 379, this Court merely disallowed the deduction by the Custodian of an arbitrary percentage

of the value of the assets for general administration expenses without reference to the expenses actually incurred in connection with the particular property. The District Court in that case did allow deduction of those items of expense which were directly attributable to the administration of the property claimed and the claimant did not appeal from that decision. No case has been cited by the petitioner in which any court has declined to permit the deduction of such direct expenses.

ARGUMENT

I

THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN A SUIT FOR THE RECOVERY OF MONEY NECESSARILY EXPENDED FROM THE PROCEEDS OF THE SALE OF PROPERTY SEIZED UNDER THE TRADING WITH THE ENEMY ACT.

A. THE TRADING WITH THE ENEMY ACT PROVIDES THAT BEFORE SEIZED PROPERTY HAS BEEN DISPOSED OF BY THE ALIEN PROPERTY CUSTODIAN A CLAIMANT MAY RECOVER THE PROPERTY IN FULL, BUT AFTER SUCH DISPOSITION THE CLAIMANT MAY RECOVER ONLY THE NET PROCEEDS.

In enacting the Trading with the Enemy Act (October 6, 1917, 40 Stat. 411, as amended; appendix to 50 U. S. C. A.), Congress recognized the fact that the administration of an Act providing for the summary seizure of the property of enemy aliens would inevitably be attended by mistakes,

and that instances would occur in which property so taken would ultimately prove to be owned by citizens or by non-enemy aliens. Accordingly, provisions for the relief of such persons were necessarily and properly incorporated in the Act.

Section 9 (a),[3] under which this suit was instituted, provides for the return of the property of a citizen from whom it has been taken under the misfaken belief that it was that of an enemy alien. Immediately upon the seizure of his property a citizen may file with the Custodian a notice of his claim. The claimant may accompany his notice with an application to the President for the return of the property. If this course is not productive of relief, the claimant may thereafter institute a suit in equity to determine the validity of his claim. In the alternative, he may, instead of applying to the President, institute his suit immediately upon filing his notice of claim with the Custodian. In either case the court is authorized to order the return of the property if the claimant is successful. Section 9 (a) further provides that upon the institution of the suit the property held by the Custodian or by the Treasurer shall be retained until a judgment in favor of the claimant shall be satisfied by the return of the property, or until a final judgment adverse to the claimant shall be entered. Section 9 (a) thus authorizes a suit *in rem* "to establish the interest, right, [or] title" to

[3] Section 9 (a) of the Trading with the Enemy Act appears in the Appendix at p. 35, *infra*.

specific property or money. The District Courts are authorized to order the return of the property "so held" by the Alien Property Custodian, or by the Treasurer.

Insofar as Section 9 (a) authorizes a suit for the proceeds of property seized and afterwards sold by the Custodian, recovery is again limited to the property "held" by the Custodian—viz., the net proceeds of the sale. This limitation appears not only from the use of the limiting expression "held by", but also from reading Section 9 (a) in conjunction with Section 7 (c) of the Act, which provides:

> *The sole relief and remedy* of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him *shall be that provided by the terms of this Act,* and in the event of sale or other disposition of such property by the Alien Property Custodian, *shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.* (Appendix 50 U. S. C. A., sec. 7 (c).) (Italics supplied.)

The clear import of this section is that where the claimant has delayed the filing of his claim until after his property has been sold and costs of sale have been incurred by the Government, those

expenses are to be satisfied out of the proceeds of the sale, and the balance returned to the claimant upon the establishment of his right.

The instant case falls squarely within the scope of Section 9 (a) as limited by Section 7 (c). The stock involved in this suit was seized by the Custodian, and held by him for more than seven months. During that time no claim to this stock was filed. The Custodian then sold the stock. Upon subsequently filing his claim therefor, the petitioner became entitled only to the net proceeds of the sale of the stock. Having already received the net proceeds of the sale of the stock (R. 8), the petitioner is precluded by the terms of Section 7 (c) from recovering any further amount.

The petitioner suggests that the sums paid out to defray the expenses of the sale form a part of the "net proceeds" of that sale (Brief, pp. 27–28). This position is clearly untenable. The sale price represents the "gross" and not the "net" proceeds. "Net proceeds" refers to that sum which is left after deducting, *inter alia*, the usual expenses of sale. This Court has so indicated in *St. John* v. *Erie Ry. Co.*, 22 Wall. 136, 148, where it was said:

> The lexical definition of *net* is "clear of all charges and deductions."—Webster. "That which remains after the deduction of all charges or outlay, as net profit."—Worcester. The popular acceptation of the term is the same.

See also *Evans* v. *Waln,* 71 Pa. 69, 74; *Dallas County* v. *Land and Cattle Co.,* 95 Tex. 200, 207; Cf. *McMurphy* v. *Garland,* 47 N. H. 316, 319–320; *Foreman* v. *Ruth Elaine Realty Corp.,* 240 App. Div. (N. Y.) 490.

Thus it is clear that Section 7 (c) expressly limits the recovery authorized by Section 9 (a), after sale of the property seized, to the sums remaining after deduction of expenses incident to the sale. In the instant case petitioner long ago has been paid this sum and is entitled to nothing more.

That this is the meaning and intention of the Act appears further from the specific language of both Sections 9 (a) and 7 (c) which in terms limit recovery to property or money *"held by"* the Custodian or Treasurer. Neither section contains the slightest suggestion of authority for the recovery of property or money properly disposed of and so no longer *"held by"* the Custodian or the Treasurer. The word "held" as used in the text of Sections 9 (a) and 7 (c) means, as both courts below have decided, that property or money must be held by the Custodian or the Treasurer *at the time suit is instituted,* and there is no warrant for the petitioner's contention that "held" as used in those sections means "held at any time" or which "should have been held" (Brief, pp. 31–34).

The petitioner has made no allegation that the defendants at present hold any money belonging to it. As pointed out by the trial court (R. 14) such a holding is expressly negatived by the bill of com-

plaint which alleges that the sums have been "paid out" (R. 4) and which asserts merely that the defendants "must be deemed in justice and truth to have had on hand" the money claimed (R. 11). Since the Trading with the Enemy Act contemplates an actual rather than a fictitious "holding", the bill of complaint clearly fails to allege facts sufficient to give the court jurisdiction over the defendants or the subject matter of the action.

B. THE LIMITATION OF RECOVERY TO THE NET PROCEEDS FOLLOWS ALSO FROM THE PROVISION OF THE ACT CONSTITUTING THE ALIEN PROPERTY CUSTODIAN A TRUSTEE

The conclusions reached by the courts below as to the construction of the Trading with the Enemy Act follows also from the provisions of Section 12 of the Act.* That section vests in the Alien Property Custodian all the powers of a common-law trustee with respect to all property, other than money, which shall be received by him under the Act and authorizes him to sell such property as though he were the owner, under rules and regulations prescribed by the President (Appendix to 50 U. S. C. A., sec. 12).

Property mistakenly seized by the Custodian and held by him, although in fact owned by a citizen, is nevertheless rightfully held by the Custodian until the citizen establishes his right to the property by appropriate proceedings under the

*Section 12 appears in the Appendix at p. 37, *infra*.

Act. This Court said in *Stoehr* v. *Wallace*, 255 U. S. 239, 245:

> That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for return in case of mistake, is not debatable.

The power of sale vested in the Custodian applies to property which may ultimately prove to be owned by a citizen or non-enemy alien as well as to property in fact enemy-owned. Thus it was stated in *Sielcken-Schwartz* v. *American Factors* (C. C. A. 2d) 60 F. (2d) 43, 45 (certiorari denied, 287 U. S. 654):

> There is not the slightest reason to suppose that this [the power of sale under Section 12] was intended to apply only to property which was in fact enemy-held, and it would have been impossible to execute the purposes of the act if it had been. The custodian, having determined that the property was subject to the act, might never discover his mistake; the owner might not apply to any court, might apparently acquiesce in his decision. The property must meanwhile be protected; good occasions not be let slip; all sorts of action might be essential in the very interest of the owner.

See also *Miller* v. *Lautenberg*, 239 N. Y. 132, 135–136 (opinion by Mr. Justice Cardozo). The Custodian, therefore, had full and complete authority under Section 12 to sell the stock of the petitioner

should he deem it advisable so to do, since petitioner had filed no claim to it under Section 9 (a). In these circumstances, the sale of the property obviously was not wrongful or unlawful, as the petitioner has repeatedly alleged it to be, but was performed in the orderly administration of the property and petitioner alleges no facts whatever to support its contrary allegation.

A trustee is normally entitled to be credited with all sums properly paid or transferred by him from the trust funds in the administration of the trust estate, even in the absence of an express provision therefor. 4 Bogert, Trusts and Trustees, (1935) sec. 971; 2 Perry, Trusts and Trustees, (7 ed.) secs. 910, 912. In the language adopted by the court in *United States* v. *Swope*, 16 F. (2d) 215, 217 (C. C. A. 8th):

> "It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges, and expenses incurred in the execution of the trust."

As has been shown, the possession by the Custodian was authorized and valid, at least until a claim for the return of the property was filed. Yet even in the case of a void trust the trustee is entitled to compensation for his expenses incurred in good faith for the benefit of the estate. *Kelly* v. *Nichols*, 18 R. I. 62; *Collumb* v. *Read*, 24 N. Y. 505, 515; *Beck* v. *Kinealy*, 89 Mo. App. 418, 424. *A fortiori*, the Custodian is entitled to receive credit

for the expenses of this sale, incurred in the administration of the trust before the owner had filed any claim for the return of its property.

The cases cited by the petitioner (Brief, pp. 23–24) as holding the contrary are not in point. They hold merely that the litigation expenses incurred in unsuccessfully defending adversary proceedings for possession of trust property against the person rightfully entitled cannot be charged against the trust property. The deduction made by the Custodian in this case was not of that character. There is a clear distinction between expenses incident to a suit maintained for the purpose of excluding the rightful claimant of a trust estate, and those which arise in the natural course of the lawful administration and protection of the property. The latter type of expense arises not in proceedings which are in derogation of the right of the owner, but rather in the management of his property. It is to be noted that the petitioner makes no allegation that the expenses, to the deduction of which he objects, and which he seeks in this proceeding to recover, were too great or were unnecessary or improper expenses in connection with the sale of the stock.

C. ONLY THE REMEDIES AFFORDED BY THE TRADING WITH THE ENEMY ACT ARE AVAILABLE TO A CLAIMANT OF PROPERTY SEIZED THEREUNDER

A suit instituted under the Trading with the Enemy Act is a suit against the United States, and must therefore be brought in conformity with the statutory requirements laid down by Congress in

giving its consent to the suit. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591; *Von Bruning* v. *Sutherland,* 29 F. (2d) 631 (App. D. C.). Thus in the *Banco Mexicano* case this Court affirmed the dismissal of a suit brought to enforce a claim under the Trading with the Enemy Act, saying (pp. 602–603):

> We are constrained to this because we agree with the Court of Appeals that this suit is in effect a suit against the United States and all of its conditions must obtain.

The petitioner in this regard appears (Brief. pp. 13–14, 33–34) to distinguish between suits brought by an enemy alien and those brought by a citizen whose property has been seized erroneously. None of the cases cited makes this distinction, and several are clear authority that the suit authorized by the Act is one against the United States, no matter by whom it may be brought. *Henkels* v. *Sutherland,* 271 U. S. 298, 301, and *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 471–472, were suits brought by citizens or friendly aliens to recover property seized, while *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 602–603, and *Miller* v. *Robertson,* 266 U. S. 243, 257, were suits brought by citizens or friendly aliens to establish claims against enemy property in the possession of the Custodian. Each expressly or by clear intimation recognizes that the suit is one against the United States.

In this case the provision of Section 7 (c) making the relief afforded by Section 9 (a) the sole

remedy available to the citizen whose property is mistakenly seized expressly excludes the right, if it otherwise might be thought to exist, of proceeding under the Tucker Act on a theory of an implied promise of compensation for the seizure.

It is further to be observed that long prior to the institution of this suit the jurisdictional statute of limitations applicable to the Tucker Act, providing that suits instituted under that statute must be brought within six years after the accrual of the right asserted, would have barred any suit under that Act.[1] Therefore, even if the Trading with the Enemy Act were deemed to be unconstitutional as not affording petitioner an adequate remedy, the District Court would have had no jurisdiction of an action to recover the amount here sought.

II

The Remedies Afforded by the Trading With the Enemy Act Amply Protect the Petitioner's Constitutional Rights

The bill of complaint in this case shows that 5,000 shares of stock were seized by the Custodian (R. 3–4). It shows that the petitioner in due course

[1] The Tucker Act, c. 359, 24 Stat. 505, as amended (28 U. S. C. A. sec. 41 (20)), vests in the District Courts of the United States original jurisdiction over suits brought on contracts, express or implied, with the Government of the United States. Suits instituted under the Act must be brought within six years after the accrual of the right for which claim is made.

claimed and instituted a suit for the recovery of 2,500 shares of the stock seized, and that pursuant to the decree entered in that suit those shares were returned to it. It reveals that the sale of the other 2,500 shares seized (*i. e.*, the stock the proceeds of whose sale are in question in this case) did not occur until seven months had elapsed from the date of seizure (R. 3–4). It fails to show that any action whatever was taken by the petitioner during that time to assert any right to that stock, and it does show that it was not until more than three and a half years had elapsed after the sale that any claim was filed with the Custodian (R. 4–5). The petitioner does not allege any facts indicating that it did not have full opportunity to file a claim with the Custodian and recover those shares in specie, as it had recovered the others.

The petitioner maintains that the construction placed on Section 9 (a) of the Trading with the Enemy Act by the courts below renders it violative of the due process clause of the Fifth Amendment (Brief, pp. 2, 28), and invokes the rule of statutory construction that a statute is to be construed, if possible, so as to make it constitutional. However, the rule of construction invoked is plainly not applicable in the instant case, because there is no ambiguity in Sections 9 (a) and 7 (c), and, moreover, those sections, under the construction given them by the lower court, do not deprive the petitioner of property without due process of law.

That the provisions of Section 9 (a) afford an adequate remedy for the relief of the citizen whose property has been mistakenly seized under the Act has been determined by this Court. In *Central Union Trust Company* v. *Garvan*, 254 U. S. 554, the Court affirmed decrees authorizing the Alien Property Custodian to take possession of property under the Act without a precedent determination of the right of the Custodian to such property, saying (at pp. 567–568):

> Upon surrender the claimant may at once file a claim under Section 9, * * * and * * * may bring a suit to establish his rights in the District Court, in which case the property is to be retained by the Custodian until final decree.

In *Stoehr* v. *Wallace*, 255 U. S. 239, the Court, in affirming a decree rejecting a claim made under Section 9 (a), sustained that section, and after reciting the remedies therein provided for the relief of the citizen whose property had been seized, stated (pp. 245–246):

> Thus there is provision for the return of property mistakenly sequestered; *and we have no hesitation in pronouncing it adequate*, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious. (Italics supplied.)

Later in *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, the Court commented upon its decisions in *Cen-*

tral Union Trust Company and *Stoehr* cases, saying (pp. 56–57):

> In other words, it is the view of the opinions that the act provides for an exercise of government, but also provides, as we have said, for mistakes in its exercise by the claimant of the property filing a claim under § 9, which, if not yielded to, may be enforced by suit.

Section 9 (a) expressly confers the right to recover property prior to sale, and, as limited by Section 7 (c), the right to recover the net proceeds after sale. The failure of petitioner to proceed prior to sale does not render the statute unconstitutional in view of the provisions contained in Sections 9 (a) and 7 (c) for recovery both before and after sale.

In any event, jurisdiction to entertain this suit, which purports to be brought under Section 9 (a), cannot be based on the ground that Section 9 (a) does not afford a constitutionally adequate remedy even if the latter conclusion should be reached. In that case petitioner would have to resort to some other form of remedy.

III

The Previous Decisions of This Court Are Consistent with and Support the Construction of the Act Limiting Recovery After Sale to the Net Proceeds Thereof

This Court has given sanction to the construction placed on Sections 9 (a) and 7 (c) of the Trading

with the Enemy Act by the respondents and by both courts below. In *Henkels* v. *Sutherland*, 271 U. S. 298, the claimant, a citizen of the United States, brought suit under Section 9 (a) of the Trading with the Enemy Act to recover the proceeds of the sale of stock which had been seized by the Alien Property Custodian. A decree rendered in his favor included interest earned on the proceeds. Upon the refusal of the Treasury to pay to him the income earned on the proceeds, which had been invested in government securities, he applied to the District Court to name a master to take and state the account of interest so earned. A denial of his application was affirmed by the Circuit Court of Appeals. On appeal this Court held that the claimant was entitled to the income earned by the proceeds of the sale which were actually held by the Treasurer, but affirmed the right of the United States to deduct the "proper charges and expenses" incurred in making the sale. The Court recognized the interrelation of Sections 9 (a) and 7 (c) by stating (at p. 300):

> Section 9 (a) authorizes a suit in equity by any person not an enemy, etc., to determine a claim to any interest, right, or title in the property seized. *If, in the meantime, the seized property has been sold, the same remedy, by § 7 (c), as amended, c. 201, 40 Stat. 1020, becomes available "against the net proceeds received therefrom and held by the Alien Property Custodian or by the*

> *Treasurer of the United States.*" (Italics supplied.)

A similar conclusion as to the effect of the two provisions is found in *Miller* v. *Lautenberg*, 239 N. Y. 132, 135–136. The Court in the *Henkels* case concluded (p. 302) that:

> Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and, thereupon, *after deducting proper charges and expenses* and taking into consideration the average amount of such proceeds which remained uninvested in the Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment. (Italics supplied.)

Although it is true as suggested by the petitioner (Brief, p. 15), that in the *Henkels* case the claimant made no claim to that portion of the proceeds which was consumed by the expenses of the sale and the cost of administering the property, it seems clear from the opinion that the Court approved the deduction of those items.

Much reliance is placed by the petitioner (Brief, pp. 17–19) upon the decision of this Court in *Escher* v. *Woods*, 281 U. S. 379. In that case the claimant, a non-enemy alien, brought suit to recover specific property mistakenly seized as enemy-owned under

the Trading with the Enemy Act. After recovery by the claimant, the Alien Property Custodian sought to deduct for administrative expenses an amount equal to two percent of the corpus which was then in the custody of the Treasurer. No attempt was made by the Custodian to show the amount of the expenses actually incurred in administering the property of the claimant. The disallowance of the deduction by the District Court was reversed by the Circuit Court of Appeals, and a writ of certiorari was granted by this Court. This Court reversed the decree of the Circuit Court of Appeals, declining to allow the deduction. This Court said (at p. 384):

> We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary *the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it, or at least others similarly due from the same owner.* (Italics supplied.)

It is clear from the language just quoted that what this Court held improper was the practice of levying a blanket charge on all the seized property in the possession of the Alien Property Custodian, irrespective of the actual cost of the administration of particular assets, and the inclusion in such blanket charge of the general office expenses and salaries in connection with the office of the Alien

Property Custodian. This Court in effect held that the Alien Property Custodian could not treat all the properties administered by him as one great trust, allocating his total expenses equally to all assets held and administered by him, irrespective of the expenses incurred in connection with particular assets. This Court did not hold that it was improper to deduct expenses directly attributable to particular assets from the *corpus* thereof.

In the *Escher* case the Custodian sought to justify the deduction of an amount for current general office administration expenses, among other ways, on the basis of an Act (Act of May 16, 1928, c. 580, 45 Stat. 573, 574), which provided that "all expenses of the office . . . . including compensation of the Alien Property Custodian . . . shall be paid from interest and collections on trust funds and other properties under the control of such Custodian." Referring to this Act, the Court pointed out that insofar as it authorized deductions for general office expenses, it provided that these deductions were to be made from current income and not from the *corpus,* saying (p. 384):

> It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

Thus this Court did not hold that *no* deductions may be made from the *corpus,* but, speaking with sole reference to the deductions expressly authorized by the Act of May 16, 1928, held that the Custodian had no authority to make such deductions from the *corpus.*

There are thus two outstanding differences between the *Escher* case and the case at bar:

1. The *Escher* case involved the deduction of a blanket charge for general administrative expenses, rather than a deduction of expenses actually incurred in connection with the administration of the claimant's property.

2. The *Escher* case involved an attempted deduction from the *corpus* of current administration expenses which the amendment of 1928 expressly provided should be deducted only from income; whereas, the deduction in the case at bar, which is authorized by Section 7 (c) of the Act, is not for current expenses but for the expenses of a transaction which directly relates to the *corpus,* namely, the sale of the stock.

No question of the deduction of actual expenses, as contemplated by Section 7 (c), was involved in the *Escher* case. Since the pronouncement of the Court in the *Escher* case relates solely to deductions authorized by the Act of 1928, and since no question of the deduction of actual expenses as contemplated by Section 7 (c) was involved, the statement of the Court provides no authority for

disallowance of the deduction from the *corpus* of the actual expenses of sale, made by the Custodian in the instant case.

An examination of the record before this Court in the *Escher* case shows that the order of the District Court allowed certain deductions for the *actual expenses chargeable to the specific property claimed,* and the claimant took no appeal from that order (R., *Escher* case, 83, 84).

The case of *Vowinckel* v. *Sutherland,* 24 F. (2d) 196 (C. C. A. 9th), cited by the petitioner, is to be distinguished, first, upon the ground that in that case the expenses which were disallowed were litigation expenses incurred by the Government in unsuccessfully resisting the claim of the person held by the court to be entitled, and, second, upon the ground that no showing was made that the Custodian was not in actual possession of the full amount of the money claimed at the time suit was instituted. The court decided that the Act could not reasonably be construed to authorize the deductions made by the Custodian, saying (at p. 198):

> Expenses incurred in resisting the former appeal were not incurred by the Custodian, or by any depositary for him, in securing the possession, collection or control of the money or property, and it seems equally manifest that they were not incurred in protecting or administering the same.

The *Vowinckel* case is similar in principle to the cases previously distinguished, *supra*, p. 19. Like those cases, it involves only the deduction of expenses incurred in resisting the claim of a party lawfully entitled to an interest in the property in dispute.

That no showing was made in the *Vowinckel* case that the sum sought to be recovered was not then in the possession of the Custodian is clear from the following discussion (at p. 198):

> But the appellee contends that the deductions have already been made, rightfully or wrongfully, and that, the funds having passed beyond the control of the Custodian, the courts are powerless to grant relief. *But this question does not arise on the present record.* The statute makes it the duty of the Custodian to retain the money and property to abide the judgment of the court, except as to the limited expenditures authorized by section 24, and until some showing is made to the contrary the courts must presume that he has discharged that duty. The contrary does not appear from the affidavit filed by the appellant, and this constitutes the complete record on this appeal. *What the result will be, should it later appear on the final hearing that the Custodian is powerless to further comply with the decree of the court, we need not now determine.* (Italics supplied.)

It is apparent, therefore, that in the *Vowinckel* case there was nothing in the record to show that the property claimed was not actually held by the Custodian. The court, in deciding that case, did not intimate that it had any power to enter a decree ordering the return of funds not held by the Custodian or the Treasurer.

CONCLUSION

It is clear from Sections 9 (a) and 7 (c) that the Trading with the Enemy Act limits recovery by citizens or nonenemy aliens to recovery of property or money held by the Custodian or Treasurer at the time suit is instituted; and that, in the event of sale of any of the property seized, recovery is limited to and can be enforced only against the net proceeds of sale. It is also clear that the words "net proceeds" contemplate the deduction of the actual expenses of sale of particular assets of the claimant. Jurisdiction to grant relief after sale is expressly limited to the net proceeds of sale which are held by the Custodian or the Treasurer. It follows that the District Court in the instant case had no jurisdiction to entertain this suit; that the court properly granted the motion to dismiss; and that the affirmance by the Circuit Court of Appeals was proper.

It is respectfully submitted that the petitioner has already received the full measure of relief to

which it is entitled under the Act, and that the order of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1935.

APPENDIX

The Trading with the Enemy Act of October 6, 1917, as amended (50 U. S. C. A. Appendix) provides, *inter alia:*

SEC. 7 (c).

* * * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the

United States may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is en-

titled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 12.

* * * * * *

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or thing in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *

U. S. GOVERNMENT PRINTING OFFICE: 1939